BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER BRANSTETTER Claimant VS.	)	
	)	Docket No. 192,712
BURRIS FABRICATION Respondent AND	)	
EMPLOYERS INSURANCE OF WAUSAU Insurance Carrier	)	

ORDER

Claimant appeals from a February 17, 1995 Preliminary Hearing Order by Administrative Law Judge George R. Robertson.

ISSUES

The Administrative Law Judge in denying claimant's request for preliminary benefits found ". . . that [claimant] did not suffer an accident that arose out of and in the course of employment. The Court, additionally, finds that there was no written notice."

Claimant, in his request for review, appeals the following issues:

(1) Whether claimant met his burden of proving that he suffered personal injury by accident that arose out of and in the course of his employment with the respondent.
(2) Whether the claimant made written claim for compensation within two hundred (200) days after the date of accident pursuant to K.S.A. 44-520a.
(3) Whether the Administrative Law Judge may raise an issue sua sponte in his Order which was not asserted as a defense at the Preliminary Hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

(1) Claimant has established by a preponderance of the evidence that he suffered personal injury by accident arising out of and in the course of his employment with the respondent.

Claimant alleges accidental injury occurred on August 5, 1994 to his right wrist. Claimant testified that on the date of accident he was drilling and removing concrete around a metal bin. His arm and wrist were really sore at the end of the day. His wrist was also swollen but he did not think much of it. He went home and took some Tylenol and went to bed. The next morning, a Saturday, he woke up and his wrist was quite swollen.

According to claimant, he told his lead man, James Arnold, at work on Friday that his wrist was hurting. On Monday it was not any better and he told Mike Burris, the owner of the company, about it. Mike told him that he could either go back to work or take a week off and go to the doctor. Claimant went to Riverside Hospital where a splint was applied to his wrist and his arm was placed in a sling. The Riverside Hospital emergency outpatient record for date of service of August 8, 1994 was admitted into evidence. It shows that the patient complained of right wrist pain since at work on Friday. The patient states that his right wrist is all swollen up and that it started hurting Friday while at work. It does not reflect any particular accident or trauma, but mentions that he does manufacturing work so he drills and lifts, etc. He was released to return to work with the restriction of no use of his right arm. He gave that restriction to his employer on Friday, a week after his injury. The employer told him that they did not have any work for him. Claimant then saw Dr. Estivo who recommended physical therapy and recommended that he not return to work until he was done with treatment.

Respondent points out that claimant had previously brought a workers compensation claim against his prior employer for injuries to his right arm. Michael Burris, the owner of Burris Fabrication, testified that the first mention of an injury to claimant's right wrist came on Monday, August 8, 1994, at 7:30 a.m. when it came time to punch in. He went out to talk to everybody and claimant notified him that he had a sore wrist. He asked claimant what he did to his wrist and claimant said he did not know. Mr. Burris states that this conversation took place out in the shop area by the time clock and that all the other employees were present. He denies that he spoke with claimant in his office and denies that claimant related his wrist injury to his work with respondent. According to Mr. Burris, following the conversation at the time clock, the claimant left and he did not hear from him for approximately a week. At that time claimant came to the shop with some papers which he handed to him and which he refused to accept so he did not know what the papers were for. He told claimant that it was not his accident, it was something claimant did and it was not anything to do with him.

At the conclusion of the Preliminary Hearing in this matter held on November 9, 1994, respondent's counsel requested leave of court to take the deposition of James Neal Arnold. The court inquired how Mr. Arnold's testimony would be germane to the case. Respondent's counsel replied that claimant alleges he reported his injury to Mr. Arnold. The court pointed out that notice was not an issue in the case, to which the respondent agreed, but respondent stated that it goes to the issue of credibility. Claimant's counsel had no objection to the taking of the deposition; whereupon, the Administrative Law Judge stated that he would hold the record open and give respondent until November 18 to provide the court with the deposition.

The deposition of James Neal Arnold was taken on behalf of respondent on November 14, 1994 and the original transcript of the deposition was received by the Division of Workers Compensation on November 17, 1994. This witness' testimony is entirely consistent with the testimony of the claimant and corroborates claimant on significant details. Mr. Arnold testified that just before noon on Friday, August 5, 1994, he was working with claimant and claimant reported to him that his wrist and shoulder, his whole side, was hurting. He asked claimant if claimant wanted to take the day off or if he wanted him to call Mike and have Mike come and get him. Claimant said, no, he would finish out the day. Mr. Arnold told claimant to report his injury as soon as possible. Although claimant did not say for sure what caused his problems, Mr. Arnold said he figured it was the Hilti drill that they were using.

Mr. Arnold further testified that the claimant did attribute his injury to his work. He said that the claimant told him he was hurting from doing the concrete work, but that he did not specify what tool caused the injury. They were using several kinds of power tools that day. They were cutting rebar out, moving a lot of heavy rock and using sledge hammers.

The following Monday, the claimant came in early and Mr. Arnold asked claimant if he had reported his injury. Claimant showed him his wrist and said that he had not yet told Mike. Mr. Arnold told claimant he had better get in there, at which time claimant went into Mike Burris' office and shut the door. Words were said and the claimant came out and left. Mr. Arnold said that his conversation with the claimant took place by the desk by the time clock but that Mike Burris was not present during that conversation. Mike was in his office which was about thirty (30) feet away. Claimant went and spoke to Mike Burris in his office behind a closed door and Mr. Arnold could not hear the conversation. He said that Mr. Burris was kind of loud, which Mr. Arnold felt was kind of understandable because the claimant was reporting his injury late and he knows Mike Burris likes to know such things the same day they happen. When the claimant came out of Mr. Burris' office, he came over to Mr. Arnold and said he had to go to the hospital. He grabbed his stuff and left.

Mr. Arnold stated that he did not hear a conversation between claimant and Mr. Burris by the time clock. Mr. Arnold stated that he was by the time clock from the time he got to work until the time claimant left and that there was no conversation between Mr. Burris and claimant while he was there.

Claimant bears the burden of proof to establish his claim. "Burden of proof" is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

> ". . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

In order to recover, the claimant must establish he has sustained a personal injury by accident arising out of and in the course of his employment. K.S.A. 44-501(a).

"Personal injury" is defined in K.S.A. 44-508(e) as:

> ". . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living."

The terms "injury" and "accident" are not synonymous. Each must be established by the claimant. An "accident" is ". . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force." K.S.A. 44-508(d). An accident is an event which causes an injury. The injury is a change in the physical structure of the body which occurs as a result of the accident. Barke v. Archer Daniels Midland Co., 223 Kan. 313, 317, 573 P.2d 1025 (1978).

The Kansas Supreme Court has ruled that it is not necessary for the injury to be caused by trauma or some form of physical force to be compensable. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 379, 573 P.2d 1036 (1978). Personal injury or injury results from an accident which can occur in a single event or from a series of events which occur over time. The event or events do not have to be traumatic or manifested by force. Rather, an accident can occur when, as a result of performing his or her usual tasks in their usual manner, the employee suffers an injury. Downes v. IBP, Inc., 10 Kan App. 2d 39, 41, 691 P.2d 42 (1984), rev. denied 236 Kan. 875 (1985).

The claimant must establish that he has sustained an accident and injury arising out of the employment and in the course of the employment. These are separate elements which must be proven in order for the claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1993). In order to establish that the incident "arose out of the employment," the claimant must show that there is some causal connection between the accident, injury and the employment. To do this, it must be shown that the injury arose out of the nature, conditions, obligations and incidents of the employment. Only risks associated with the work place are compensable. "In the course of the employment," relates to the time, place and circumstances under which the accident occurred, and that the injury happened while the employee was at work at his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

It is well settled in this state that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction. Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984). Demars v. Rickel Manufacturing Corporation, *supra*; Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

Based upon the evidence and the record as it now exists, the claimant has met his burden of proving accidental injury on August 5, 1994 and that said injury arose out of and in the course of his employment with the respondent.

(2)(3) The claimant served written claim for compensation upon the employer within two hundred (200) days after the date of accident as required by K.S.A. 44-520a.

The respondent, at the Preliminary Hearing held November 9, 1994, stipulated for purposes of preliminary hearing that written claim was timely made. Under the circumstances, the Administrative Law Judge may not sua sponte raise the issue of timely written claim. To hold otherwise would deny the claimant a fair hearing and opportunity to present evidence. Furthermore, the record reflects that this matter was docketed on August 18, 1994 by the Division of Workers Compensation. The claimant's August 11, 1994 notice of intent letter to the respondent seeking benefits is part of the court file. The claimant's form K-WC E-1 Application for Hearing was filed August 12, 1994 and finally, the November 9, 1994 Preliminary Hearing was itself held within two hundred (200) days of the alleged accident date. The Administrative Law Judge's Order of February 17, 1995 states, "The Court, additionally, finds that there was no written notice." Since written claim was obviously timely made, it would be conceivable that this finding by the Administrative Law Judge refers to notice of injury, pursuant to K.S.A. 44-520, rather than written claim, pursuant to 44-520a, were it not for the fact that the Administrative Law Judge specifically stated at page 48 of the transcript of the November 9, 1994 Preliminary Hearing proceedings that notice is no longer a factor to which respondent's counsel replied, "That's correct."

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the February 17, 1994 Order of Administrative Law Judge George R. Robertson should be, and is hereby, reversed and remanded to the Administrative Law Judge for further proceedings and/or order on the issues of temporary total disability compensation, payment of medical expenses and authorizing medical treatment, consistent with the findings and conclusions expressed herein.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Larry Shoaf, Wichita, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director